ULTRA DIMENSION SDN BHD

v.

KOOK WEI KUAN

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[CIVIL APPEAL NO: R2-12-404-2001]
3 DECEMBER 2001

CIVIL PROCEDURE: *Striking out - Statement of claim - Respondent claimed damages for invasion of privacy because of publication of photograph in advertisement of two local papers - Whether there was a reasonable cause of action - Whether there was any cause of action in tort - Whether an intrusion into respondent's private rights - Whether a breach of confidence - Subordinate Courts Rules 1980, O. 14 r. 21(1)(a)*

CIVIL LAW ACT: *English law - Applicability of English common law in Malaysia - Invasion of privacy rights - Whether recognised under English common law - Civil Law Act 1956, s. 3*

This was an appeal by the appellant against the decision of the sessions court judge dismissing the appellant's application under O. 14 r. 21(1)(a) of the Subordinate Courts Rules 1980 to strike out the respondent's summons and statement of claim. The appellant's staff had taken a photograph of a group of kindergarten's pupils, including the respondent, at an open area outside the kindergarten ('the photograph') and published it in two local newspapers with the theme "Bonus Link Share Your Points" ('the advertisement'). The respondent claimed damages against the appellant on the ground that the appellant's action of supplying the photograph for the advertisement had invaded the respondent's privacy. The respondent's causes of action pleaded in his statement of claim were for invasion of privacy and breach of confidence. The appellant contended that the summons and statement of claim disclosed no reasonable cause of action and, thus, ought to be struck out because: (i) privacy rights were not recognised under Malaysian law; and/or (ii) the respondent had not satisfied all the elements for the causes of action which he relied upon.

Held:

[1] The publication of the photograph in the advertisement did not give the respondent a cause of action as the facts of the case did not fall within the boundaries of any recognised and existing tort. (p 289 c)

[2] English common law does not recognise privacy rights; therefore, invasion of privacy rights does not give rise to a cause of action. Since English common law, pursuant to s. 3 of the Civil Law Act 1956, is applicable in Malaysia, privacy rights which is not recognised under English law is accordingly not recognised under Malaysian law. Thus, the respondent did not have the right to institute an action against the appellant for invasion of privacy rights. (p 289 g)

[2a] A cause of action may only arise if photographs were highly offensive in nature and showed a person in an embarrassing position or pose. On the facts of the instant appeal, the photograph was not offensive in nature at all because it was merely a photograph of a group of kindergarten pupils in a cheerful mood taken at an open area outside the kindergarten, and there was no publication of any information relating to the respondent in the advertisement. The photograph neither pictured the respondent in shameful circumstances nor did it intrude into the respondent's private rights. (p 290 g-h)

[3] The photograph was not a piece of confidential information as the appellant did not receive it from the respondent. There can only be a breach of confidence if the information is confidential in nature and as the photograph was not confidential, the respondent did not have a right of action against the appellant. Furthermore, there was no photographer-customer relationship between the appellant and the respondent. Therefore, there was no understanding whatsoever between both parties pertaining to the usage of the photograph, and the appellant was at liberty to use the photograph without the need to obtain the consent or permission of the respondent or the respondent's guardians. (p 292 f & 295 c)

[Appeal allowed.]

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2000] 2 CLJ 457 CA ***(foll)***

Kanawagi Seperumaniam v. Penang Port Commission [2001] 5 MLJ 433 ***(refd)***

Kaye v. Robertson [1991] FSR 62 ***(refd)***

Pollard v. Photographic Company [1888] 40 Ch D Vol xl 345 ***(dist)***

Legislation referred to:

Civil Law Act 1956, s. 3

Federal Constitution, art. 5(1)

Rules of the High Court 1980, O. 18 r. 19(1)(a)

Subordinate Courts Rules 1980, O. 14 r. 21(1)(a)

Other source(s) referred to:
Clerk & Lindsell on Torts, para 31.09
Halsbury's Laws of England, 4th edn, vol 45, p 631, para 1383

For the defendant/appellant - WK Law; M/s Dennis Nik & Wong
For the plaintiff/respondent - Wong Rhen Yen; M/s Liow & Co

Reported by Suresh Nathan

JUDGMENT

Faiza Tamby Chik J:
The respondent/plaintiff has made a claim against the appellant/defendant at the Kuala Lumpur Sessions Court for damages for invasion of privacy rights alleged to have been committed by the appellant against the respondent. The appellant has filed an application pursuant to O. 14 r. 21(1)(a) of the Subordinate Courts Rules 1980 on 4 July 2000 to strike out the respondent's summons and statement of claim dated 2 February 2000 on the basis that the summons and statement of claim discloses no reasonable cause of action against the appellant. The appellant's application was heard by the Kuala Lumpur Sessions Court on 21 June 2001 and was dismissed with costs. This is the appellant's appeal against the whole of the Kuala Lumpur Sessions Court Judge's decision delivered on 21 June 2001 which dismissed the appellant's application with costs.

The background of the case is that on or about 1995, the staffs and agents of the appellant have taken a photograph of a group of kindergarten's pupils (including the respondent at an open area outside the kindergarten ("the said photograph")). The said photograph was said to be published in an advertisement in "The Star" newspaper on 21 July 1999 and "Sin Chew Jit Poh" on 22 July 1999 which carried the theme "Bonus Link Share Your Points" ("the said advertisement"). The respondent has made a claim against the appellant on the ground that the appellant's action in supplying the said photograph for the purpose of advertisement was said to have invaded the privacy of the respondent. The causes of action pleaded by the respondent in the statement of claim is as follows: (a) invasion of privacy, and (b) breach of confidence. The appellant has filed an application to strike out the summons and statement of claim on the ground that the summons and statement of claim discloses no reasonable cause of action and thus, ought to be struck out because privacy rights pleaded by the respondent is not recognised under Malaysian laws; and/or the respondent has not satisfied all the elements for the causes of action which he relied upon.

Section 3 of the Civil Law Act 1956 provides as follows:

> 3. Application of UK common law, rules of equity and certain statutes.
>
> (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:
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> (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956.

The English Common Law pertaining to privacy rights is stated in *Halsbury's Laws of England*, 4th edn (vol. 45) at p. 631, para 1383 which reads as follows:

> 1383. Infringement of privacy
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> A person does not commit a tort merely because he unreasonably invades the personal privacy of another; however, a recognised existing tort may served to protect privacy in particular circumstances. If a newspaper maliciously publishes information about a person's distant criminal past an action in defamation may lie. It is a trespass to enter a person's home without permission or to install a secret eavesdropping device. If a photographer sells to the national press a copy of a wedding photograph of someone who is now an object of public interest he might be sued for infringement of copyright. Persistent harassment by telephone calls could amount to an actionable nuisance.
>
> If the facts do not fall within the boundaries of an existing tort then no action lies. To fly an aircraft over the plaintiff's house in order to photograph it is not actionable; nor is it libel to write that a well-known public figure keeps pornographic paedophilic material, if the statement were true. Using a telescopic camera to photograph activities in the plaintiff's bedroom does not meet the requirements of the tort of nuisance, and so is not actionable. To place a listening device in a hotel bedroom in order to record the guests' intimate conversation affords no action in trespass to the guests because they do not have possession of the room.

Based on the above I am of the opinion that invasion of privacy will only give rise to a cause of action provided that the facts fall within the boundaries of an existing and recognised tort. For example, defamation, infringement of copyright and nuisance. In this case, it is clear that the facts of the respondent's case does not fall within the boundaries of any recognised tort:

Defamation	–	The appellant did not do anything which lowered the reputation of the respondent/plaintiff. Thus, tort of defamation is not applicable.

Infringement of copyright	–	The respondent does not own the copyright of the said photograph. The copyright of the said photograph belongs to the appellant. Thus, there is no infringement of copyright.
Nuisance	–	The appellant did not unlawfully interfere with the respondent's use or enjoyment of the land or some right over, or in connection with it. Thus, tort of nuisance is not applicable.

I think the publication of the said photograph in the said advertisement did not give the respondent a cause of action as the facts of the case does not fall within the boundaries of any recognised and existing tort. The case of *Kaye v. Robertson* [1991] FSR 62 referred to in the book of *"Torts in the Nineties - Nicholas J Mullany"* fortifies the view that privacy rights is not recognised under English law and therefore, there is no cause of action for invasion of privacy rights. At p. 176 in *"Torts in the Nineties - Nicholas J Mullany"* it is stated that:

> As Glidewell LJ said:
>
> > It is well known that in English law there is no right to privacy and there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals.
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> Bingham LJ thought that the case highlighted yet again the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens. The defendant's conduct was a "monstrous invasion of his privacy" yet it alone, however gross, did not entitle him to relief in English law ...

Based on the above authorities, I am of the view that it is clear that English Common Law does not recognise privacy rights and it therefore follows that invasion of privacy rights does not give rise to cause of action. As English Common Law is applicable in Malaysia pursuant to s. 3 of the Civil Law Act 1956, privacy rights which is not recognised under English Law is accordingly not recognised under Malaysian law. Thus, the respondent does not have the right to institute an action against the appellant for invasion of privacy rights. It is noteworthy that invasion of privacy rights via taking and publication of photographs (as in the facts of the instant appeal) is also not recognised in countries such as Australia and the United States of America. Page 183 in the book of *"Torts in the Nineties - Nicholas J Mullany"* touched on privacy rights in Australia and the United States which states:

> Unwanted photographs are a source of particular difficulty. As a general rule it is no tort simply to take a photograph of a person when in a public place or of a person's property without his or her consent. It amounts to nothing more than making a record not differing essentially from a full written description of a public site which anyone would be free to see.
>
> ...
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> In *Bathurst City Council v. Saban,* Young J identified an exception to the general rule in situations where the photographs in question were offensive. He thought it would be as much open to an Australian as an American court to give relief to a plaintiff who complained that someone had taken a photograph of him in a shockingly wounded condition after a road accident or that she had been standing innocently over the air vent in a fun house and someone had photographed her with her skirt blown up. The exception perhaps was limited to photographs of a person in an embarrassing pose which were surreptitiously taken and published. It would cover, for example, the taking of secret photographs of a person engaged in sexual activity or arranging large mirrors so as to observe all that passed in the operating room of a nearby dentist. Young J's views are noteworthy for his acceptance that intrusive photographs may in principle be actionable, although it may be that his particular examples would not all give rise to a remedy, even in the United States.

Further, at p. 184 in the book of *"Torts in the Nineties - Nicholas J Mullany"* it is stated as follows:

> Bound up with the question whether a matter is private is the fourth element to liability, whereby the disclosure must be highly offensive and objectionable to a reasonable person of ordinary sensibilities. The especially sensitive who complain about publicity being given to harmless or neutral facts have no redress.

Therefore the above extracts show that the invasion of privacy rights does not give rise to a cause of action and is not actionable. A cause of action may only arise if the photographs are highly offensive in nature and show a person in an embarrassing position or pose. On the facts of the instant appeal, I think the said photograph is not offensive in nature at all because it is merely a photograph of a group of kindergarten pupils in cheerful mood taken at an open area outside the kindergarten, and there was no publication of any information relating to the respondent in the said advertisement. The said photograph was used for a decent purpose which was for an advertisement for Bonuslink card. The said photograph did not picture the respondent in "dalam keadaan memalukan", and the said photograph does not intrude into the private rights of the respondent. Furthermore, the said photograph was taken at a public

place which was an open area outside the kindergarten which anyone present would be free to see and take photographs of the children there. I am of the view that the taking of photographs at public places where there are many passersby and the publication of such photographs in newspapers, brochures and other reading materials does not give rise to a cause of action. Privacy rights has been defined in *"Torts in the Nineties - Nicholas J Mullany"* p. 176 to mean the right to be left alone and live free from all intrusions by others. It states:

NATURE OF PRIVACY

> Giving a comprehensive definition of privacy is fraught with difficulty and only the broadest of proposition can be safely ventured. It may be said that a person's interest in privacy is invaded where, without the person's consent, others see or hear or read about what he or she does or says, or what others say or do comes unwillingly to his or her attention. So understood any "right" to privacy amounts to no more that the right of a person to be left alone; yet no-one, or virtually no-one, can live so as to be free from all intrusions by others. Perhaps the hermit who retires to a remote and unpopulated place may attain such a state but most of us are required, unwillingly or otherwise to rub shoulders with our fellow human beings. Contact with others is the price of existence as a social being.

"Privacy Rights" which is the right to be left alone and live free from all intrusions by others as defined in the above extract is different from "Life" and "Personal Liberty" which can be interpreted to mean enjoyment of life and freedom of an individual to move and be engaged in any activities (which does not contravene the laws) without any hinderance or obstacles as define in art. 5 of the Federal Constitution. Therefore "privacy rights" is not included and not provided under art. 5(1) of the Federal Constitution. I think the English Common Law referred to by the appellant in the instant case before me relates to the issue of cause of action for invasion of privacy and not the issue to remedy for industrial cases involving dispute between employer-employee as in the case of *Kanagawi s/o Seperumaniam v. Penang Port Commission* [2001] 5 MLJ 433. The English Common Law referred to by the appellant relating to privacy rights is indeed relevant and applicable to the instant case pursuant to the provision of s. 3 Civil Law Act 1956.

The respondent also alleged that there is a breach of confidence on the part of the appellant. Reference is made to p. 187 in the book of *"Torts in the Nineties - Nicholas J Mullany"* where breach of confidence is explained as follows:

> An action for breach of confidence may lie where a person has received information of a confidential nature in circumstances importing an obligation of confidence, and that person has made, or is about to make, an unathorised disclosure or use of the information to the detriment of the confider. ... Certainly the obligation of confidence commonly arises as regards ideas which are of commercial value. It has been said that what makes the information confidential is the fact that the maker "has used his brain and thus produced a result which can only be produced by somebody who goes through the same process."

At para. 31.09 in the book of "*Clerk & Lindsell on Torts*" confidential information is defined as follows:

> The disclosure of information will only be restrained if it has the necessary quality of confidence about it. It must not be something which is trivial, public property or public knowledge ... In assessing whether such information is capable of being regarded as confidential, it has been held that "... what makes it confidential is the fact that the maker of the document has used his brain and then produced a result which can only be produced by someone who goes through the same process". By making use of such information the recipient avoids having to do the work, even assuming that he is capable of doing it. It is this which gives rise the "springboard doctrine."

I think on the facts of the instant appeal, the information alleged by the respondent to be confidential is the said photograph. The said photograph is not confidential information as the said photograph was produced by the appellant. In other words, the appellant is the maker of the said photograph and not the respondent. This means that the said photograph is not a piece of confidential information as the appellant did not receive the said photograph from the respondent. There can only be a breach of confidence if the information is confidential in nature. As the said photograph is not confidential, the respondent does not have a right of action against the appellant. It is noted that the respondent did not plead in the statement of claim that the said photograph was allegedly for the respondent's personal use. The respondent merely states in para. 3 of the statement of claim that the said photograph was taken without the knowledge and consent of the parents and/or guardian of the respondent. Moreover, if the respondent and/or the parents and/or guardian of the respondent themselves did not know that the photograph was taken, how is then possible for the respondent to state now that allegedly the said photograph was for the respondent's own personal use? This is simply illogical. Thus, the respondent's submission that the said photograph was allegedly for the respondent's own personal use should not be accepted or considered at all. This is because in a striking out application pursuant to

O. 14 r. 21(1)(a) of the Subordinate Courts Rules 1980 (or O. 18 r. 19(1)(a) of the Rules of the High Court 1980), the court could only consider the facts pleaded in the statement of claim and nothing beyond that. In *Abdul Rahim bin Abdul Hamid & Ors. v. Perdana Merchant Bankers Bhd. & Ors.* [2000] 2 CLJ 457 the court stated:

> In considering an application under O. 18 r. 19(1)(a), the court has to take into account the statement of claim on the face of it and no consideration whatsoever shall be paid to the evidence in the form of these affidavit ...

Moreover the statement by the respondent in para. 3 of the statement of claim that the said photograph was taken without the knowledge and consent of the parents and/or guardian of the respondent clearly goes to show that there was never an implied term or agreement that the said photograph was only for the respondent's own personal use, and more importantly, there was never a contract between the appellant and the respondent. I think the appellant need not obtain the consent of the parents and/or the guardian of the respondent to supply the said photograph to a third party or to republish or to use the said photograph for the following reasons. Firstly, there was never a contract between the appellant and the respondent. This was proven by the respondent's own statement in para. 3 of the statement of claim wherein the respondent stated that the said photograph was taken without the knowledge and consent of the parents and/or guardian of the respondent. Secondly, the said photograph was taken at a public place, ie, an open area outside a kindergarten which is open to the public. Therefore, any passerby which is in that area is free and is at liberty to take photographs in that area as that area was simply a public space.

The case of *Pollard v. Photographic Company* [1888] 40 Ch. D Vol. xl 345 relied by the respondent can be distinguished from the instant appeal. In that case it is stated:

> The question, therefore is, whether a photographer who has been employed to take his or her portrait is justified in striking off copies of such photograph for his own use, and selling and disposing of them, or publicly exhibiting them by way of advertising or otherwise, without the authority of such customer, either express or implied. ... Where a person obtains information in the course of a confidential employment, the law does not permit him to make any improper use of the information so obtained; and an injunction is granted, if necessary to restrain such use; as for instance, to restrain a clerk from disclosing his master's accounts, or an attorney from making known his client's affairs, learned in the course of such employment. Again, the law is clear that a breach of contract, whether express or implied, can be restrained by injunction. In my opinion the case of the photographer comes within the principles upon which both these classes of cases depend. The object for which

> he is employed and paid is to supply his customer with the required number of printed photographs of a given subject. ... I hold that the bargain between the customer and the photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only.

I think the *Pollard* case show as follows:

(a) A photographer (ie, the defendant in that case) has been employed to take the photographs of Mrs. Pollard (ie, the plaintiff in that case);

(b) There existed an understanding and/or agreement between the said photographer and his customer ie, Mrs. Pollard that the said photograph was only for Mrs. Pollard's own personal use only and hence, cannot be given to other parties or be used for any other purposes.

The facts in the *Pollard* case are very different from the instant case. The appellant was never employed by the respondent or any person for that matter to take the photograph of the respondent. There never existed any understanding and/or agreement between the appellant and the respondent that the said photograph was only for the respondent's own personal use or that the said photographs cannot be given to other parties or used for any other purposes.

The *Pollard* case can be distinguished from the instant case on these grounds. Firstly, in the *Pollard* case, there was an agreement or contract entered into between Mrs. Pollard and the photographer, especially pertaining to the terms of usage of the photograph. However, in the instant case there was never an agreement or contract between the appellant and the respondent. Therefore, there are no terms whatsoever, express or implied pertaining to the usage of the said photograph. Secondly, in *Pollard* case, there was a breach of contract by the photographer when the photograph of Mrs. Pollard was used for other purpose without the knowledge and consent of Mrs. Pollard. In the instant case, there was no breach of contract by the appellant because there was simply no contract entered into between the appellant and the respondent. Therefore, the appellant does not need to obtain the permission or consent from the parents and/or guardian of the respondent pertaining to the usage of the said photograph. Thirdly, in *Pollard* case, there was a photographer-customer relationship between the photographer and Mrs. Pollard which creates the understanding that the photograph of Mrs. Pollard can only be taken for Mrs. Pollard's own personal use only. Therefore, the photographer has abused the confidence placed in him by Mrs. Pollard when he republished and used the photograph without the knowledge and consent of Mrs. Pollard. The relevant extract in the *Pollard* case is as follows:

> The customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer; and in my opinion the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power confidentially placed in his hands merely for the purpose of supplying the customer; and further I hold that the bargain between the customer and the photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only.

In the instant case there was no photographer-customer relationship between the appellant and the respondent. Therefore, there was no understanding whatsoever between both parties pertaining to the usage of the said photograph. In other words, the appellant is at liberty to use the said photograph without the need to obtain the consent or permission of the respondent and/or the parents and/or the guardian of the respondent.

I am of the opinion that the *Pollard* case was decided on the grounds that there was a breach of contract and abuse of confidential power in a photographer-customer relationship. This can be distinguished from the instant case before me. This is because in the instant case before me, there is no contract at all (let alone a breach of contract) and there is also no photographer-customer relationship between the appellant and the respondent as the appellant was not employed by the respondent to take the said photograph. Therefore, it is clear that the *Pollard* case is not applicable and is not relevant to the instant case before me.

For these reasons the appeal is hereby allowed with cost. The decision of the Sessions Court is hereby set aside.